#### No. 15-2710

### UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

# ARMANDO DIAZ Appellant

v.

### ROBERT A. MCDONALD, SECRETARY OF VETERANS AFFAIRS, Appellee.

#### APPEAL FROM FINAL DECISION OF THE BOARD OF VETERANS' APPEALS

### BRIEF OF APPELLANT, ARMANDO DIAZ

Chris Attig, Esq. Attig Law Firm, PLLC P.O. Box 7775

San Francisco, CA 94210-7775

Phone: (866) 627-7764 Facsimile: (214) 741-2337 Email: chris@attiglawfirm.com

Date: MAY 9, 2016

FOR THE AGENCY:

Clifton A. Prince, Esq., Attorney
Department of Veterans Affairs OGC (027F)
810 Veterans Avenue NW
Washington, DC 20420
clifton.prince@va.gov
Telephone: 202-632-6979

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#### ISSUES PRESENTED FOR REVIEW

- I. Where the Board failed to comply with its duty to assist the Veteran in the development of his claim by relying upon inadequate examinations, did it commit prejudicial legal error?
- II. Where the Board failed to provide adequate reasons and bases for its decision, including its reliance upon an inadequate medical examination, its finding that the Veteran's more recent statements were not significantly credible and its acceptance of a VA opinion that relied on the Veteran's ethnicity as a more likely etiology, did the Board commit prejudicial legal error?

#### STATEMENT OF THE CASE

The Appellant ("Mr. Diaz" or "the Veteran") served honorably in the United States Army from February 1964 to July 1966. R-988-91. In June 1965, the Veteran was treated for injuries sustained when a truck ran over his hand. R-1843, 2975. A Fort Hood service medical record dated July 1965 indicated that the Veteran was suffering from residuals of an accident. R-1035-38. An October 1965 service medical record revealed that the Veteran was suffering from pain due to an accident three months prior. R-1009. Numerous February 22, 1966 service medical records indicate that Mr. Diaz was involved in an automobile accident. R-1015, 1047, 1975, 2000-07, 2981. This accident was determined to have occurred in the line of duty. R-2065, 3056. Additional Fort Hood service medical records from March to July 1966 involve treatment for injuries sustained in a truck accident. R-1010-14, 1016-25, 1032. The Veteran treated

for his neck pain, tingling and numbness at Salt Lake Clinic in 1994 and 1995, and at Canyon Rim in 1995 through 2000. R-2655, 3283, 3285, 3290-94, 3347-64.

Mr. Diaz sought service connection for his neck disability in October 2003. R-212. He appeared at a Decision Review Officer hearing the same month. R-2932-48. He testified that he fell off a moving truck during service operations in the field. R-2936-37. Mr. Diaz further testified that he was involved in a second accident in February 1966, and his neck was injured during this accident. R-2946-47. The Veteran underwent a Compensation and Pension examination in July 2004. R-2828-36. The examiner found that his cervical spine condition "like as not is not related to military service." R-2830.

In April 2006, Mr. Diaz stated that, while in the military, he was thrown from a truck moving 20 to 30mph, and that he was taken to Darnell Military Hospital with a neck collar. R-2600-01. Mr. Diaz explained that "with no money, struggling for day-to-day survival, a newborn baby and a 6<sup>th</sup> grade education in my repertoire, realistically, there was no thought for medical treatment." R-2601. He also conceded that he had reinjured or aggravated his neck and back in the years following service. *Id.* Mr. Diaz included a letter from Richard Feher, D.C. R-2604-08. The Board issued a decision in December 2006, in which it remanded the Veteran's pending claims. R-2526-32.

Mr. Diaz testified at a hearing before the Board in August 2007. R-2444-74. He testified that in the time leading up to discharge from service, he had spent approximately nine months in the hospital. R-2449. He explained that his separation examination was silent because "I was in a hurry to get out and not go back to hospitals or doctors, I just wanted to go home. I did not mention it." *Id.* He described his first in-service accident

in June 1965, where he was riding on the back of a truck when he was tossed out of the moving vehicle. R-2456, 2462. He began to testify as to his neck, which he believes is related to falling off of this moving vehicle, but he was cut off to resume testimony pertaining to his hand. R-2462. In November 2007, the Board remanded the Veteran's claim. R-2423-2427.

In May 2008, the RO issued a Supplemental Statement of the Case and continued its denial of his claims. R-2135-40. The Veteran's representative submitted a statement in June 2008. R-2066-67. The RO issued another Supplemental Statement of the Case in August 2008. R-2104-111. The Board issued a decision the following month. R-2068-86. Mr. Diaz underwent another Compensation and Pension examination in November 2008. R-1954-60. The examiner noted the Veteran's 1965 accident with documentation of a laceration to his scalp and injury to his hand, as well as the Veteran's contention that his neck disability was caused by this same accident. R-1954. The examiner further noted that the Veteran was currently retired, but had spent most of his life as a student or employed as a waiter. R-1956. The Veteran reported pain, stiffness, weakness, fatigability, lack of endurance and loss of motion. *Id.* The examiner opined that his cervical spine disability was not related to service, and gave the following explanation:

The veteran has 40 years of essentially absent medical records for chronicity of his cervical spine. From a review of the records and the available information and evidence, there is **no indication that the veteran suffered a significant cervical spine condition** in 1966 while on active duty.

<u>More likely etiologies for these claimed conditions are the more</u> <u>common etiologies</u> for osteoarthritis including, but not limited to: age, obesity, deconditioning, heredity, ethnicity, concomitant health issues, subsequent trauma and intercurrent injury, life style choices and post-service occupation.

R-1960 (emphasis added).

That month, Mr. Diaz also stated that during service, he was thrown from a moving vehicle and does not recall much other than being picked up with his neck stabilized. R-1971-72. He was involved in a second accident the following year, and his neck continued to be problematic since service. *Id.* Mr. Diaz submitted a statement in November 2008 in which he referred to the VA online system showing a denial regarding his cervical spine condition, and he indicated that he disagreed with the denial. R-1939. On December 22, 2008, the RO issued a decision in which it denied service connection for a neck disability. R-1926-36. Mr. Diaz submitted a timely notice of disagreement in January 2009. R-1921.

The Veteran appeared at a Decision Review Officer hearing in September 2010. R-1879-99. He again testified regarding his two in-service accidents and how his neck was impacted. R-1892-93. In December 2010, the Veteran learned that the Board issued a decision in September 2010 and mailed it to the wrong address. R-1671. Mr. Diaz did not receive this decision until December 2010. R-1671-80, 1872, 1877.

VA acknowledged receipt of Mr. Diaz's VA Form 9 in July 2013. R-921, 933, 1635. In March 2014, Mr. Diaz learned that his claims had been closed due to an alleged lack of response. R-1218-19. The Veteran outlined the steps he had taken to continue and perfect his appeal. *Id.* He again informed VA of the steps he had taken over the many years of his pending claims and appeals in June 2014. R-1259-74. The Board

issued a decision on March 23, 2015. R-2-20. It reopened his claim for a cervical spine condition and, *inter alia*, denied service connection. This appeal ensued.

#### SUMMARY OF THE ARGUMENT

The Board violated its duty to assist the Veteran in the development of his claim where it relied upon an inadequate VA medical examination. The Board further failed to provide an adequate statement of reasons or bases for its decision, including its reliance on such an examination, its determination that Mr. Diaz was not "significantly credible," and by accepting a VA medical opinion that was based, in part, upon the Veteran's ethnicity. The Board's errors prejudiced Mr. Diaz because they resulted in the denial of his claim.

#### STANDARD OF REVIEW

The Court reviews the Board's decisions regarding claims for either increased ratings or for service connection under the clearly erroneous standard. A determination regarding service connection or the degree of impairment for purposes of rating a disability is an issue of fact. *Hayes v. Brown*, 9 Vet.App. 67, 72 (1996); *Francisco v. Brown*, 7 Vet.App. 55, 57-58 (1994). The Board's answer to that question is subject to review for clear error. *Davis v. West*, 13 Vet.App. 178, 184 (1999); *Mense v. Derwinski*, 1 Vet.App. 354, 356 (1991). However, the Court reviews claimed legal errors by the Board under the de novo standard, by which the Board's decision is not entitled to any deference. 38 U.S.C. § 7261(a)(1); *see Butts v. Brown*, 5 Vet. App. 532 (1993) (en banc). The Court will set aside a conclusion of law made by the Board when that conclusion is determined to be "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law." *Butts*, 5 Vet. App. 532. The Court should determine whether the Board's decision is not in accordance with the law.

#### **ARGUMENT**

# I. THE BOARD VIOLATED ITS DUTY TO ASSIST THE VETERAN BY RELYING UPON INADEQUATE MEDICAL OPINIONS.

Service connection generally means that "the facts, shown by the evidence, establish that a particular injury or disease resulting in disability was incurred coincident with service in the Armed Forces[.]" 38 C.F.R § 3.303(a). An in-service diagnosis of the claimed disability is not necessary to grant service connection; rather, "[s]ervice connection may be granted for any disease diagnosed after discharge, when all the evidence, including that pertinent to service, establishes that the disease was incurred in service." 38 C.F.R. § 3.303(d). In *Cosman v. Principi*, 3 Vet.App. 503, 505 (1992), the Court explained that service connection may be permitted "even though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards."

VA is subject to a mandatory duty to assist a claimant "in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the Secretary." 38 U.S.C. § 5103A(a). This duty applies to the Board as well as the regional office. *See Holland v. Brown*, 6 Vet.App. 443, 448 (1994). This duty "shall include providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A (d)(1). However, the VA's duty is not discharged simply by conducting a medical examination; the medical examination must be adequate for adjudication purposes. *See* 

38 C.F.R. § 4.2 (2015) ("[I]f the report does not contain sufficient detail, it is incumbent upon the rating board to return the report as inadequate for evaluation purposes.").

Once the Secretary undertakes the effort to provide an examination when developing a claim of service connection, even if not statutorily obligated to do so, the Secretary must provide an adequate examination or notify the claimant why one will not or cannot be provided. See Barr v. Nicholson, 21 Vet.App. 303, 311-12 (2007). A medical examination report, when reviewed for adequacy, should be supported by reasoning, and not simply be a list of data followed by conclusions. *Nieves-Rodriguez v.* Peake, 22 Vet.App. 295, 304 (2008). The Court has held "a mere conclusion by a medical doctor is insufficient to allow the Board the make an informed decision as to what weight to assign to a doctor's opinion." Stefl v. Nicholson, 21 Vet.App. 120, 125 (2007). The Court again echoed this in *Nieves-Rodgriguez*, where it stated "the Board must be able to conclude the medical expert has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusions submitted in the medical opinion." *Nieves-Rodriguez*, 22 Vet.App. at 304. As to what weight to assign a medical opinion, the Court has held "the probative value of medical opinion evidence is based on the medical expert's personal examination of the patient, the physician's knowledge and skill in analyzing the data, and the medical conclusion that the physician reaches." Guerrieri v. Brown, 4 Vet.App. 467, 470-71 (1993). The Court may review the adequacy of a medical examination, especially one which the VA and Board heavily relied upon in the adjudicatory process.

The issues of competency of lay evidence and whether contemporaneous medical evidence is necessary for lay evidence to be found credible are not new to the Court.

Under *Dalton v. Nicholson*, 21 Vet.App. 23, 39-40 (2007), it is inadequate for an examiner to simply state that a disability is not etiologically related to a veteran's military service based on a lack of medical treatment for the disability in service. In *Dalton*, the medical examiner reviewed the claims file and the service medical records and found no evidence of any back injury while the veteran was in service. *Id.* In concluding that the medical examination was inadequate, the Court explained that rejection of the nexus between a disability and a veteran's service cannot be based on the premise that the medical examiner observed a "lack of notation or treatment of a[n]... injury in service." *Id.* 

The Board's analysis in this case is similar to that in *Buchanan v. Nicholson*, 451 F.3d 1331, 1336 (Fed. Cir. 2006). In *Buchanan*, the VA examiner's opinion "failed to consider whether the lay statements presented sufficient evidence of the etiology of the veteran's disability such that his claim of service connection could be proven without contemporaneous medical evidence." *Id.* at 1336. The Board relied upon lack of contemporaneous medical records to find lack of credibility, and noted that the "[r]ecollections of medical problems some 20 years after the veteran's separation from service have slight probative value and lack credibility absent confirmatory clinical records to substantiate such recollections." *Id.* The Court found that this seemingly necessary search for confirmatory medical records in order to find credibility violated the law. *Id.* at 1337 ("... reflects a legally untenable interpretation of the above enumerated

statutory and regulatory provisions: that absent confirmatory medical evidence, lay evidence lacks credibility").

This Court again considered the effect of lay evidence in *Jandreau v. Nicholson*, 492 F.3d 1372 (2007) when a veteran asserted that he injured his right shoulder during training but the Board rejected his assertion because the determinative issue involved a medical diagnosis or medical etiology. The Court emphasized its holding in *Buchanan*, namely that lay evidence is one type of evidence that must be considered, and that competent lay evidence can be sufficient in and of itself. *Id.* at 1376-77; *see Buchanan*, 451 F.3d at 1335; 38 U.S.C. § 5107(b) ("the Secretary shall consider all . . . lay and medical evidence of record in a case . . . with respect to benefits.").

Here, Mr. Diaz underwent a compensation and pension examination in July 2004. R-2828-34. The examiner simply stated in regard to the Veteran's cervical spine disability, "Like as not it is not related to military service." R-2830. This sparse conclusion, not even a full grammatical sentence, is wholly inadequate and does not rise to the level of a reasoned, detailed medical opinion. *See Stefl*, 21 Vet.App. at 125 ("a mere conclusion by a medical doctor is insufficient to allow the Board to make an informed decision as to what weight to assign to the doctor's opinion"). The Court, in *Nieves-Rodriguez*, further explained, "[i]t is the factually accurate, fully articulated, sound reasoning for the conclusion, . . ., that contributes probative value to a medical opinion." 22 Vet.App. at 304. A reliable, adequate medical opinion must allow the Board to conclude that the expert "has applied valid medical analysis to the significant facts of the particular case in order to reach the conclusion submitted in the medical opinion." *Id*.

In November 2008, the Veteran underwent a second VA examination in connection with his cervical spine. R-1954-60. This examiner provided a negative nexus opinion, and rationalized that there were "40 years of essentially absent medical records for chronicity of his cervical spine." R-1960. He found "no indication of **significant** cervical spine condition in 1966" and gave the following rationale:

The veteran has 40 years of essentially absent medical records for chronicity of his cervical spine. From a review of the records and the available information and evidence, there is **no indication that the veteran suffered a significant cervical spine condition** in 1966 while on active duty.

More likely etiologies for these claimed conditions are the more common etiologies for osteoarthritis including, but not limited to: age, obesity, deconditioning, heredity, ethnicity, concomitant health issues, subsequent trauma and intercurrent injury, life style choices and post-service occupation.

R-1960 (emphasis added).

There are several problems with this opinion. First, the examiner's clear reliance upon the "40 years of essentially absent medical records" and "no indication of significant cervical spine condition" is misplaced and in violation of *Buchanan, Jandreau* and *Dalton*. This Court has explained that rejection of the nexus between a disability and a veteran's service cannot be based on the premise that the medical examiner observed a "lack of notation or treatment of a[n] . . . injury in service" and that "nothing in regulatory or statutory provisions [. . .] require both medical and competent lay evidence; rather [. . .] competent lay evidence can be sufficient in and of itself." *See Buchanan*, 451 F.3d at 1336; *Jandreau*, 492 F.3d. at 1376-77; *Dalton*, 21 Vet.App. at 39-40. By relying on absence of documentation before he would consider the Veteran's lay statements,

rather than considering whether the lay statements presented sufficient evidence of the etiology of Mr. Diaz' cervical spine disability such that his claim could be proven without contemporaneous medical evidence, the examiner committed the same errors as in *Buchanan, Jandreau* and *Dalton*, which led to findings of legal error.

Next, the examiner's indication of the lack of a "significant cervical spine condition" in service is misplaced (emphasis added). First, the examiner's search for an indication of a significant condition holds the Veteran to a higher standard than required by the established case law. There is no support for the proposition that a veteran must prove the existence of a significant medical condition in order to establish nexus to service. Second, the examiner's meaning of the word significant is unclear. The Veteran, the Board and the Court are precluded from understanding precisely what this physician meant in his compensation and pension examination report, a document heavily relied upon by the Board to deny service connection. In fact, this finding may even support service connection, as it suggests that there was in fact indication of a cervical spine condition in service, but that it simply did not rise to this particular examiner's definition of "significant."

Finally, the examiner identified numerous risk factors that he believed were responsible for the Veteran's "claimed conditions" such as "age, obesity, conditioning, heredity, ethnicity, concomitant health issues, subsequent trauma, and intercurrent injury, lifestyle choices and post-service occupation." R-1960 (emphasis added). By his use of the word "conditions," it is unclear whether the examiner was considering Mr. Diaz' cervical spine disability, or any other claimed disability, or combination thereof.

Interestingly, earlier in his report, this very examiner noted that Mr. Diaz was 69" tall and 163 lbs. R-1958. This suggests that the examiner simply listed general risk factors which may or may not be applicable to Mr. Diaz. In the alternative, the examiner identified at least one risk factor pertinent to this particular veteran that is actually contradicted by the record, i.e. identifying obesity for a 5 foot 9 inch male weighing 163 lbs. *See Nieves-Rodriguez*, 22 Vet.App. at 304.

The Veteran was prejudiced by the Board's reliance upon these inadequate medical opinions to the exclusion of the private medical opinions because its reliance on these opinions likely altered the Board's determination. Had the Board considered that the VA medical opinions were inadequate, it may have returned them as such or given more weight to the private medical opinions of record, which could have led to a grant of service connection and compensation for his cervical spine disability. *See Arneson v. Shinseki*, 24 Vet. App. 379, 389 (2011) (finding prejudice when Board error "could have altered" the Board's determination). Remand is therefore required for the Board to comply with its duty to assist.

## II. THE BOARD FAILED TO PROVIDE AN ADEQUATE STATEMENT OF REASONS AND BASES FOR ITS DECISION.

38 U.S.C. § 7104(d)(1) mandates that the Board include "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record[.]" *See Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990). This requirement is a fundamental means "to enable a claimant to understand the precise basis for the Board's decision, as well as to

facilitate review of this Court." *D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008) (citing *Gilbert*, 1 Vet.App. at 57). The Board is to consider all relevant evidence of record and discuss all "potentially applicable" provisions of law and regulation. *Gutierrez v. Principi*, 19 Vet.App. 1, 7 (2004) (citing *Schafrath v. Derwinski*, 1 Vet.App. 589 (1991)).

The Board must consider and discuss all the relevant evidence in the record, as well as provide an adequate discussion when rejecting material evidence that is favorable to the veteran. *Dela Cruz v. Principi*, 15 Vet.App. 143, 149 (2001) (finding that the Board is not required to discuss all evidence of record, but must discuss relevant evidence); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000).

### a. The Board failed to properly support its credibility finding

In the instant decision, the Board reconsidered its previous denial of service connection for, *inter alia*, a cervical spine disability based in part on service records showing a car accident with scalp laceration. R-5. The Board noted a current cervical spine disability and an in-service incident, a motor vehicle accident. R-10. However, the Board then noted that no cervical spine disability was noted at discharge nor in the years immediately following discharge. This finding violated the Federal Circuit's holding in *Buchanan* and *Jandreau* when it based its negative credibility determination on an absence of contemporaneous medical evidence. 451 F.3d at 1336-37; 492 F.3d. at 1376-77.

During his October 2003 Decision Review Officer hearing, Mr. Diaz identified two in-service auto accidents. He stated that in 1965, he fell off a truck and ended up practically underneath the truck, and the truck ran over his hand. R-2935-36. He

testified that he received treatment at Darnel Army Hospital after his accident, during which a collar was placed on his neck due to concern about the impact. R-2932-33. He stated that in February 1966, he was involved in a second accident and hurt his neck, back and had sutures to his scalp. R-2946. Mr. Diaz's testimony surrounding the accident was consistent during his August 2007 hearing before the Board. R-2444-73. He testified that he was thrown off the back of a truck and his hand was run over by the truck. R-2456-57. He explained that by the time of his separation examination, he had been in hospitals for at least nine months and "just wanted to go home," so he did not mention his complaints. R-2449. Finally, during his Decision Review Officer hearing in September 2010, he again explained that he was thrown off a truck on June 26, 1965, injured his neck when he was thrown, and was given a neck brace immediately following the accident. R-1882; 1892-93.

Despite this testimony, the Board failed to consider the Veteran's explanation for why there is no reference to his neck condition, and failed to consider the likelihood of the Veteran suffering a neck injury when he was thrown from a moving vehicle onto the road. In its summary of the evidence, the Board only discussed the February 1966 accident, in which Mr. Diaz suffered a scalp laceration and hand injury. R-8. There is no discussion of his June 1965 accident. *Id.* Instead, the Board stated that "[a]lthough the Board has considered the Veteran's recent contentions that he has experienced neck problems since service, the Board finds such statements are not significantly credible." R-11. The Board then notes that he specifically denied back trouble at separation, that he did not complain of neck pain during treatment for his back, that he reported in 1994

that his neck pain had just begun, and that "[a]ll contentions otherwise began after the Veteran submitted a claim." *Id*.

There are several problems with the Board's credibility finding. First, the law is clearly established that the absence of evidence is not negative evidence. *AZ v. Shinseki*, 731 F.3d 1303, 1318 (Fed. Cir. 2013) (Where claimant states in-service incident was not reported, absence of service records documenting the incident aren't pertinent evidence it didn't occur); *Kahana v. Shinseki*, 24 Vet. App 428, 433-34 (2011) (there must be valid basis to support inference that injury would have been recorded in military service records before a lack of recordation can support a finding a Veteran is not credible). The Board's treatment of Mr. Diaz's separation examination as negative evidence violates *AZ* and *Kahana*.

Second, the Board must fully explain why it finds a veteran not credible. There is no indication in the Board's statement that it considered his specific explanations during his 2003, 2007 and 2010 hearings, as well as his 2006 statement. R-1892-93, 1971, 2600-01, 2932, 2935-37, 2940-46. The Veteran's explanations have been both consistent and reasonable regarding the lack of documentation in his separation examination. The Board must consider and discuss all the relevant evidence in the record, as well as provide an adequate discussion when rejecting material evidence that is favorable to the veteran, and it failed to do so here. *Dela Cruz*, 15 Vet.App. at 149; *Thompson*, 14 Vet.App. at 188.

The Board's terse statement that it "considered the Veteran's recent contentions that he has experienced neck problems since service," does not amount to the "adequate

discussion" required to reject material evidence favorable to the Veteran. R-11; *see Dela Cruz* and *Thompson, supra*. That the Veteran later suffered an automobile accident in the 1990s has no bearing on whether his current disability began in service. The Board failed to provide any substantive discussion as to whether it was conceivable that a veteran could suffer a cervical spine disability following a fall from a moving vehicle that resulted in at least a broken hand and scalp laceration, in addition to a subsequent automobile accident. Had the Board given proper consideration to the Veteran's lay statements, it likely would not have denied Mr. Diaz's claim.

# b. The Board failed to support its reliance upon the November 2008 VA opinion

As argued above, the November 2008 opinion upon which the Board relied to deny Mr. Diaz's claim was wholly inadequate, and the Board failed to provide adequate reasons and bases for its reliance on such an inadequate medical opinion. The Board found this examination "highly probative" because the "examiner noted the lack of neck treatment for 40 years post service and other more likely etiology factors." R-11. As discussed earlier in this brief, the examiner's reliance on lack of treatment for 40 years is both factually incorrect and in violation of *Buchanan, Jandreau* and *Dalton*.

Moreover, the Board does not identify those "other more likely etiology factors," which are both contradicted by the record (obesity) and vague (ethnicity, lifestyle choices, post-service occupation). Although there is no reasons and bases requirement imposed on examiners, this responsibility is still imposed on the Board. *D'Aries*, 22 Vet. App. at 104. When presented with an inadequate opinion, the Board must address its

deficiencies in order to provide an adequate statement of reasons or bases for its decision. See Gabrielson v. Brown, 7 Vet.App. 36, 40 (1994).

The Board's decision denying Mr. Diaz entitlement to service connection for his cervical spine disability was therefore in error. This error prejudiced the Veteran as it caused his claim to be denied, and as a result, his case should be remanded with instructions for the Board to comply with its duty to assist and provide adequate reasons and bases for its decision.

# c. The Board failed to support its acceptance of ethnicity as a more likely etiology

As argued above, the Board erred in its reliance upon the November 2008

Compensation and Pension examination to deny Mr. Diaz's claim for service connection and compensation for his cervical spine disability. In providing his negative nexus opinion, the examiner explained,

More likely etiologies for these claimed conditions are the more common etiologies for osteoarthritis including, but not limited to: age, obesity, deconditioning, heredity, ethnicity, concomitant health issues, subsequent trauma and intercurrent injury, life style choices and post-service occupation.

R-1960 (emphasis added).

Of particular interest, the examiner determined that the Veteran's Hispanic ethnicity was a "more likely" etiology for his cervical spine osteoarthritis, yet he did not reference a single piece of medical evidence or medical literature indicating that ethnicity is a risk factor for cervical spine osteoarthritis. R-1954-60.

The Fifth Amendment which applies to the federal government, specifically requires the government to respect all rights, guarantees and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive a person of life, liberty or property. Due process essentially guarantees that a person will receive a fundamentally fair and just proceeding. The Equal Protection clause was implemented to ensure fair treatment of all legal citizens, such that no person or class of persons be denied the same protection of the laws that is enjoyed by other persons in like circumstances in their lives, liberty or property.

The Board's acceptance and reliance upon this medical opinion to deny the Veteran's claim is problematic. This particular VA examiner pointed to Mr. Diaz's Hispanic ethnicity as a "more likely etiology" of his claimed cervical spine disability, but he did not cite to any medical evidence of record or any medical literature to support such a connection. *See* R-1954-60. If VA examiners can point to veterans' ethnicity, without any reference to actual medical evidence, in support of negative nexus opinions, this would violate veterans' rights to fundamentally fair and just proceedings, as well as cause an entire class of veterans to be denied service connection for disabilities that are service-connected for other classes of veterans of a different ethnicity. In turn, the Board would be implicated in these constitutional violations through its acceptance and reliance upon such opinions to deny the VA benefit of service connection.

#### **CONCLUSION**

In view of the foregoing, the Board's decision that denied Mr. Diaz entitlement to service connection for a cervical spine disability was in error. Mr. Diaz respectfully

requests that the Board's decision be vacated and the appeal remanded with instructions for the Board to properly apply the law and provide adequate reasons and bases for its decision.

DATE: MAY 9, 2016 RESPECTFULLY SUBMITTED,

/s/ Christopher F. Attig, Esq.

Chris Attig, Attorney for Appellant Texas State Bar No. 24055119

ATTIG LAW FIRM, PLLC P.O. Box 7775 San Francisco, CA 94120-7775 Phone: (866) 627-7764

Facsimile: (214) 741-2337 Email: chris@attiglawfirm.com

#### **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the United States of America that on May 9, 2016, I served a copy of this APPLELLANT'S BRIEF ON APPEAL, in the matter of Diaz v. McDonald, Docket No. 15-2710, via Court's CM/ECF filing system; additionally, a courtesy copy of the Appellant's brief on appeal was sent to Counsel for the Appellee, via e-mail.

Clifton A. Prince, Esq., Attorney Department of Veterans Affairs OGC (027F) 810 Veterans Avenue NW Washington, DC 20420 clifton.prince@va.gov Telephone: 202-632-6979

> By: /s/ Christopher F. Attig Law Firm Chris Attig, Attorney for Appellant Texas Bar No. 24055119 Attig Law Firm, PLLC P.O. Box 7775 San Francisco, CA 94120-775

> > Phone: (866) 624-7764 Facsimile: (214) 741-2337 Email: <a href="mailto:chris@attiglawfirm.com">chris@attiglawfirm.com</a>